Filed 6/28/10 P. v. Studabaker CA3

NOT TO BE PUBLISHED



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>RYAN DAVID STUDABAKER,<br><br>Defendant and Appellant. | C061967<br><br>(Super. Ct. Nos. CRF08602, CRF08571) |

In case No. CRF08602, a complaint alleged that in September 2008, defendant Ryan David Studabaker assaulted G.G. by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1); count I),[1] committed a battery on G.G. and inflicted serious bodily injury (§ 243, subd. (d); count II), and actively participated in a street gang (§ 186.22, subd. (a); count III). It was alleged as to count I that defendant personally inflicted great bodily injury on a person

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[1] Further undesignated statutory references are to the Penal Code.

other than an accomplice (§ 12022.7, subd. (a)), and as to counts I and II that the crimes were committed to benefit a criminal street gang (§ 186.22, subd. (b)(1).)

In case No. CRF08571, a complaint alleged that in December 2008, defendant took or drove a vehicle without the consent of the owner (Veh. Code, § 10851, subd. (a); count I) and received stolen property (§ 496, subd. (a); count II).

In January 2009, defendant entered a negotiated plea of no contest to vehicle theft (case No. CRF08571, count I) and battery with serious bodily injury (case No. CRF08602, count II); he admitted that the battery was to benefit a criminal street gang.

Defendant was sentenced to state prison for seven years eight months, consisting of the low term of two years for the assault, five years for the street gang enhancement (§ 186.22, subd. (b)(1)), and eight months for the vehicle theft. The remaining counts and allegations were dismissed.

Rejecting defendant's argument that the street gang enhancement term should be two years, the court set the term at five years because the underlying battery was a serious felony, in that it would also constitute a felony violation of section 186.22, within the meaning of section 1192.7, subdivision (c)(28). (§§ 186.22, subd. (b)(1)(B), 1192.7, subd. (c)(28).)

On appeal, defendant contends, and the Attorney General effectively concedes, section 1192.7, subdivision (c)(28) cannot be used to make the battery a serious felony. The Attorney General claims any error is harmless because the battery was a

serious felony under a different section, that is, section 1192.7, subdivision (c)(8). Defendant's plea to battery with serious bodily injury effectively admitted that he had inflicted great bodily injury. (§ 1192.7, subd. (c)(8).) We shall affirm the judgment.

**FACTS**[2]

In September 2008, in Yuba County, defendant, with the specific intent to promote, further, or assist criminal conduct by other Sureños, personally inflicted serious bodily injury consisting of a laceration requiring six stitches, upon victim G.G. Defendant was an active participant in a subset of the Sureños, a criminal street gang, with knowledge that its members engage in or have engaged in a pattern of criminal gang activity. An expert would testify that defendant willfully promotes, furthers or assists in any felonious criminal conduct by his subset of the Sureño gang. While a member, during his current offense, defendant specifically intended to commit the offense for the benefit of, in association with, or at the direction of, his gang.

**DISCUSSION**

Defendant contends he "should have been sentenced on the gang enhancement pursuant to subdivision (b)(1)(A) of [] section 186.22, rather than under subdivision (b)(1)(B) of that section,

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[2] Because the matter was resolved by plea, our statement of facts is taken from the prosecutor's statement of factual basis. Our statement is limited to the battery and the street gang enhancement.

and the cause must be remanded for resentencing." He relies primarily on *People v. Briceno* (2004) 34 Cal.4th 451, at pages 464-465 (*Briceno*), and *People v. Bautista* (2005) 125 Cal.App.4th 646, at pages 656-657 (*Bautista*), arguing that the "impermissible bootstrapping [condemned in *Briceno*] is precisely what occurred in the present case." The Attorney General agrees that, under *Briceno*, defendant's "current conviction was apparently not a serious felony under" section 1192.7, subdivision (c)(28). We agree with the parties on this point.

Section 186.22, subdivision (b)(1)(B) states: "If the felony is a serious felony, *as defined in subdivision (c) of Section 1192.7,* the person shall be punished by an additional term of five years." (Italics added.)

*Briceno* explained: "When Proposition 21 added section 1192.7(c)(28), it also amended section 186.22(b)(1) by adding the substantive language contained in (b)(1)(A), (B), and (C). [Citation.] Section 186.22(b)(1)(A) provides that a person convicted of 'a felony' that is gang related shall receive, at the court's discretion, an additional two-, three-, or four-year term at sentencing. Section 186.22(b)(1)(B) provides that a person convicted of 'a serious felony' that is gang related shall receive an additional five-year term at sentencing. Section 186.22(b)(1)(C) provides that a person convicted of a 'violent felony' that is gang related shall receive an additional 10-year term at sentencing. Thus, section 186.22(b)(1)(A), (B), and (C) speaks to an event that occurs in

the current proceeding. Section 1192.7, subdivision (c)[28][3], on the other hand, comes into play only if the defendant reoffends, at which time any *prior* felony that is gang related is deemed a serious felony. Thus, any felony that is gang related is not treated as a serious felony in the current proceeding, giving effect to section 186.22(b)(1)(A). [Citation.] [¶] . . . [¶] [A]lthough section 1192.7(c)(28) turns any prior gang-related felony offense into a strike if a defendant reoffends, nothing in Proposition 21 or in its stated purposes suggests an intention of the voters to bootstrap, in the same proceeding, any felony offense committed for the benefit of a criminal street gang into a section 186.22(b)(1)(B) offense 'as a means of applying a double dose of harsher punishment.' [Citation.]" (*Briceno, supra,* 34 Cal.4th at pp. 464-465, fn. omitted.)

In this case, the trial court expressly relied on section 1192.7, subdivision (c)(28) to impose the greater punishment, the five-year state prison sentence, specified in section 186.22, subdivision (b)(1)(B). For the reasons stated in

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[3] We have added the bracketed "[28]" to avoid an absurdity. Section 186.22, subdivision (b)(1)(B) states: "If the felony is a serious felony, *as defined in subdivision (c) of Section 1192.7*, the person shall be punished by an additional term of five years." (Italics added.) If the entirety of "Section 1192.7, subdivision (c)" came "into play only if the defendant reoffends" (*Briceno, supra,* 34 Cal.4th at pp. 464-465), then it could not supply a definition of "serious felony" for any "current proceeding." Obviously, neither the electorate nor the Supreme Court intended that result. (*Id.* at p. 465.)

*Briceno*, this was error. (See *Bautista, supra*, 125 Cal.App.4th at p. 657.)

The Attorney General claims section 186.22, subdivision (b)(1)(B), nevertheless applies to this case because the battery with serious bodily injury was a serious felony under another statutory provision: section 1192.7, subdivision (c)(8). In other words, defendant's crime was a serious felony, not because it was gang related, but because he inflicted great bodily injury. We agree.[4]

In case No. CRF08602, count I and its personal infliction of great bodily injury enhancement put defendant on notice that the prosecution intended to prove that he personally inflicted *great* bodily injury on G.G. on September 19, 2008, evidently in the same incident that underlay count II. (See *People v. Taylor* (2004) 118 Cal.App.4th 11, 23 (*Taylor*).) Thus, there is no due process impediment to the Attorney General's argument that defendant's admission of serious bodily injury effectively established great bodily injury.

Nor is there a factual impediment. In pleading no contest to count II, defendant effectively admitted that the injury suffered by the victim--a laceration requiring six stitches--had been factually sufficient to constitute *serious* bodily injury. (*Taylor, supra,* 118 Cal.App.4th at p. 24.) In his reply brief,

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[4] The recent amendments to section 4019 do not operate to modify defendant's entitlement to credit, as he was committed for a serious felony. (§ 4019, subds. (b)(2) & (c)(2); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.)

defendant admits that his statement of factual basis for the plea provides that he "did personally inflict serious bodily injury, to wit: a laceration requiring six stitches, upon the victim G.G."

"Serious bodily injury" is defined as "a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement." (§ 243, subd. (f)(4).) Conversely, "great bodily injury" is defined as "a significant or substantial physical injury." (§ 12022.7, subd. (f).)

"Until 1977 both of the statutes contained the detailed definition now found in section 243 alone." (*People v. Kent* (1979) 96 Cal.App.3d 130, 136-137.) Our Supreme Court previously opined that the 1977 amendment to section 12022.7 changing serious bodily injury to great bodily injury "*was not intended to lessen the magnitude of bodily injury required* by the 1976 detailed definition of great bodily injury," but "was designed to preclude the possibility that the 1976 detailed definition of great bodily injury be construed as all inclusive, leaving no latitude to the trier of fact to find a bodily injury of equal magnitude to the categories specified in the detailed definition but not coming literally within any category set forth therein." (*People v. Caudillo* (1978) 21 Cal.3d 562, 581-582, overruled on other grounds in *People v. Martinez* (1999) 20

Cal.4th 225, 229, and disapproved in *People v. Escobar* (1992) 3 Cal.4th 740, 751, fn. 5, italics added.)

However, our Supreme Court later opined that "*Caudillo* erred in concluding that the Legislature intended no change in the definition of 'great bodily injury' when it discarded the specific criteria set forth in the original version of section 12022.7 and substituted the more general 'significant or substantial physical injury' test then in use. Clearly, the latter standard contains no specific requirement that the victim suffer 'permanent,' 'prolonged' or 'protracted' disfigurement, impairment, or loss of bodily function." (*People v. Escobar, supra*, 3 Cal.4th at pp. 749-750.)

Thus, in amending section 12022.7, the Legislature *broadened* great bodily injury while leaving serious bodily injury unchanged. To the extent that great bodily injury is broader, it now *includes* serious bodily injury. (Civ. Code, § 3536 [the greater contains the less].) *Put differently, the amendment did not exclude any sort of serious bodily injury from the broadened scope of great bodily injury*. This broadening of great bodily injury beyond the bounds of serious bodily injury does not assist defendant, because his plea to the narrower necessarily places him within the broader.

Defendant's argument overlooks this legislative and judicial history and mistakenly assumes that great bodily injury is narrower, not broader, than serious bodily injury. He claims he "merely agreed and his counsel only stipulated to the personal commission of *serious bodily injury* and to application

of the gang enhancement statute to the present case by virtue of gang activity in its commission, *not that the injury rose to the gravity of [great bodily injury] and thus came under section 1192.7, subdivision (c)(8).*" (Italics added.)

Defendant's reliance on *People v. Taylor, supra,* 118 Cal.App.4th 11 is misplaced. *Taylor* correctly noted that great and serious bodily injury presently "have separate and distinct statutory definitions"; however, it overlooked the history that brought them to that point. (*Id.* at p. 24.) Specifically, the court overlooked the fact that, under the reasoning of *Escobar,* the amendment of the definition of great bodily injury was intended to broaden its scope, not to exclude from its reach any injury that also qualifies as serious bodily injury.

In any event, *Taylor* is inapposite for reasons we have previously set forth: "In *Taylor*, a jury returned verdicts finding three great bodily injury enhancements alleged against the defendant not true. [Citation.] Nonetheless, the trial court found the defendant's conviction for battery with serious bodily injury (§ 243, subd. (d)) was a serious felony for purposes of the enhancement under section 667, subdivision (a)(1). [Citation.] Division One of the Court of Appeal for the Fourth Appellate District held that the trial court was precluded from finding the defendant's current offenses were serious felonies based on the infliction of great bodily injury when the jury had made express findings to the contrary. [Citation.] Acknowledging that 'serious bodily injury' and 'great bodily injury' have been viewed by courts as having

'"substantially the same meaning,"' the appellate court nonetheless concluded that the jury's finding of serious bodily injury could not be deemed the equivalent of a finding of great bodily injury based on the particular circumstances of the case. [Citation.] These circumstances included the nature of the victim's injuries (which included a small facial bone fracture that would heal on its own); the jury instructions containing different definitions for the two terms; the arguments of counsel implying a distinction between great bodily injury and serious bodily injury; and the jury's question during deliberations regarding whether a simple bone fracture could constitute great bodily injury. [Citation.] The appellate court concluded that, under such circumstances, the trial court was not at liberty to make a legal determination contrary to the jury's factual finding. [Citation.] [¶] *Taylor* is readily distinguishable from the present matter. Here, . . . defendant waived jury trial . . . . Thus, the trial court did not 'substitute[] its own . . . legal determination for the express factual findings of the jury' [citation] and the narrow ruling of *Taylor* does not apply. As recognized by the court in *Taylor*, 'In the absence of any contrary indication in the record, the trial court . . . [i]s justified in applying the usual assumption that "great bodily injury" and "serious bodily injury" are "essentially equivalent."' [Citation.]" (*People v. Arnett* (2006) 139 Cal.App.4th 1609, 1615.)

Here, by admitting that he had personally inflicted serious bodily injury, defendant effectively admitted that he had

personally inflicted great bodily injury. He was eligible for the five-year enhancement provided by section 186.22, subdivision (b)(1)(B). The trial court's erroneous belief that this was so, pursuant to paragraph (28) rather than paragraph (8) of section 1192.7, subdivision (c), was harmless by any standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711].)

**DISPOSITION**

The judgment is affirmed.

CANTIL-SAKAUYE, J.

We concur:

NICHOLSON, Acting P. J.

RAYE, J.